東吳大學九十七學年度博士班招生考試試題

系級	法律學系博士班	考試時間	90 分鐘
科目	法學英文	本科總分	100 分

I. Please explain the following terms <u>in English.</u> (50%)

1、*Respondeat Superior*

2、*Caveat Emptor*

3、Double Jeopardy

4、*Force Majeure*

5、Nuisance

6、Ordinance

7、*Amicus Curiae*

8、Proximate Cause

9、Certiorari

10、*Scienter*

II. Please Translate the Following Paragraphs into <u>Chinese</u>. (50%)

The special attitudes and assumptions about law that characterized the work of the Pandectists and that make up what is here called legal science can thus be summarized in the following terms: scientism, system-building, conceptualism, abstraction, formalism, and purism. These characteristics of legal science are apparent to many civil lawyers, and there have been many reactions against it in the civil law world. These reactions have taken a variety of forms, but legal science is far from dead. In all except the most advanced civil law jurisdictions it reigns practically undisturbed. It dominates the faculties of law, permeates the law books, and thus is self-perpetuating. The average law students is indoctrinated early in his career and never thinks to question it: its characteristics, and the model of the legal system that it perpetuates, are all he knows. Legal science has been subjected to direct attack and to subversion from many sides. Its critics have tried to introduce consideration of concrete problems, to see that the

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existence of a subconscious and of intuition are taken into account, to bring nonlegal materials to bear on the legal consideration of social problems, and to involve legal scholar in the conscious pursuit of socioeconomic objectives. Nevertheless, the average civil lawyer still forms his own ideas of the law according to the teachings of legal science.

Although the common law world has seen occasional brief trends toward the kind of thinking that characterizes legal science, it has never really caught on here. Legal science is a creation of the professors - it smells of the lamp - and our judge-dominated law is fundamentally inhospitable to it. Common law judges are problem solvers rather than theoreticians, and the civil law emphasis on scientism, system-building, formalism, and the like gets in the way of the legal process, to the advantage of the legislator and the scholar. Both sociological jurisprudence - which is the opposite of abstraction, formalism, and purism – and legal realism – which rejects scientism and system-building – emphasize the difficulty and the importance of focusing on the judicial process. Both have flourished in the common law world, and particular in the United States.

It is true that the famous case method of instruction, which is a creation of law professors in the United States, originated under the influence of German legal science; the idea was that decisions of courts, being sources of law, should be studied as data with the aim of deriving principles of law from them and finally arranging them into a coherent system. The end product of this line of thought in the United States was *The Restatement of Law,* and its publication provided the occasion for a thorough, devastating attack by the legal realists. Since that attack, legal science has been essentially discredited in the United States, and the emphasis in legal education has subtly shifted. Cases are still studied, but they are no longer studied as the data of legal science. Instead, they are seen as convenient records of concrete social problems and as convenient examples of how the legal process operates.

The basic difference is epitomized in another quotation from the German legal scientist Rudolph Sohm: "A rule of law may be worked out either by developing the consequences that it involves, or by developing the wider principles that it presupposes. . . .The more important of these two methods of procedure is the second, i.e. the method by which, from given rules of law, we ascertain the major premises they presuppose. . . .The law is thus enriched, and enriched by a purely scientific method." An American legal realist would resist the implication that rules of law should be the principal objects of his study or the suggestion that there are only these two ways of

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studying them. But if pushed to Sohm's choice, most law professors, judges, and lawyers in the United States would easily and quickly choose the first of his two methods. Most civil lawyers would still choose the second.